Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Requests of US West Communications, Inc.	)	
for Interconnection Cost Adjustment	)	CCB/CPD 97-12
Mechanisms	)	

CC 97-90

COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC. IN SUPPORT OF PETITION FOR DECLARATORY RULING

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SUMMARY

TCG agrees with Petitioners that recent state filings by US West Communications, Inc. ("US West") proposing to impose an Interconnection Cost Adjustment Mechanism ("ICAM") on new local exchange service competitors would unlawfully circumvent the scheme of section 252 of the Communications Act regarding interconnection, unbundling network elements, and resale obligations. Section 252 provides guidance with respect to the rates that may be collected by incumbent local exchange carriers ("ILECs") for interconnection, unbundled elements, resale, and transport and termination. Section 252 also provides a framework for negotiating carriers to agree on those rates or enlist the assistance of the state commission to establish rates in dispute. In this provision, therefore, Congress set forth both the pricing standards that apply for the purpose of providing competitive local exchange service pursuant to section 251 and the process for requesting carriers and ILECs to enter into interconnection agreements. US West's ICAM petitions disregard both the statutory pricing standards and the binding nature of interconnection agreements reached in accordance with section 252 and the FCC's implementing order, and must be rejected.

Implementation of US West's ICAM proposal would erect a barrier to entry for competitive carriers by imposing inappropriate and unpredictable costs on these carriers. Despite entering interconnection agreements in accordance with the statutory procedure outlined by section 252 of the Act, US West is effectively ignoring these agreements by attempting to impose additional costs on

interconnectors. State commissions reasonably have accommodated US West's cost recovery concerns in the course of interconnection arbitrations, but US West, apparently unsatisfied with the terms of its arbitrated agreements, is pursuing an improper means of exacting payments from TCG and other CLECs. However, imposition of the ICAM may prevent CLECs from providing service in US West's territory by considerably raising the CLECs' costs of providing service in these areas. If adopted by any state, therefore, the ICAM would violate section 253.

Finally, TCG agrees with Petitioners that US West's state petitions also constitute an abuse of states' processes. The commissions in the states in which TCG has interconnection agreements with US West already have identified both the procedural means and cost recovery mechanisms that US West may employ, through full arbitration proceedings. However, in an effort to assess additional charges upon CLECs beyond those authorized by the 1996 Act, US West is now requesting that state commissions impose its costs on CLECS, thereby discouraging the entry of competition in the local exchange service market. This waste of state commission resources in considering US West's meritless petitions, and CLEC resources in challenging them, only serves to delay further the development of local competition and should be interdicted by the Commission.

The granting of US West's state ICAM petitions would violate the Communications Act by imposing costs upon CLECs outside of the Section 252 pricing regime and procedural framework, and by erecting a barrier to entry prohibited by Section 253. Moreover, further waste of state commission and

CLEC resources to consider and review the meritless state petitions is contrary to the public interest. Therefore, the Commission should grant the Petition for Declaratory Ruling and reject the ICAM proposal.

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COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.
IN SUPPORT OF PETITION FOR DECLARATORY RULING

Teleport Communications Group Inc. ("TCG") hereby supports the Petition for Declaratory Ruling filed by Electric Lightwave, Inc.; McLeodUSA Telecommunications Services, Inc.; and Nextlink Communications, L.L.C. (collectively, "Petitioners") on February 20, 1997.

I. INTRODUCTION

TCG agrees with Petitioners that recent state filings by US West Communications, Inc. ("US West") proposing to impose an Interconnection Cost Adjustment Mechanism ("ICAM") on new local exchange service competitors would unlawfully circumvent the scheme of section 252 of the Communications Act regarding interconnection, unbundling network elements, and resale obligations. TCG's own experience with US West in reaching interconnection agreements pursuant to the Communications Act makes it well-qualified to provide the Commission with its views regarding US West's ICAM petitions. TCG has actively pursued interconnection agreements with US West in six states: Arizona,

Colorado, Nebraska, Oregon, Utah, and Washington. After many efforts to reach a negotiated agreement with US West, TCG ultimately had to petition the commission in each of the six states to arbitrate TCG's agreement with US West. The state commissions' efforts resulted in fair agreements, rates consistent with the Commission's TELRIC standard, and adequate cost recovery mechanisms for US West. In all of its arbitrations, US West has sought higher unbundled element rates and transport and termination rates, and lower avoided costs discounts than those ultimately ordered by any of the commissions. Having lost the arbitrations with regard to these rates, US West's ICAM filings are nothing but an attempt to get a prohibited second bite of the apple. If allowed to proceed, US West's ICAM filings will undermine the scheme carefully crafted by Congress and implemented by this Commission. Therefore, this Commission must grant the Petition and reject US West's improper attempt to impose on TCG and others fees that have already been rejected.

Section 252(d) of the Act does not contemplate the ICAM surcharge that has been contrived by US West to impede competition in its service area. The rates and terms governing the relationships between competitive local exchange carriers ("CLECs") and incumbent local exchange carriers ("ILECs") are required by section 252 to be set forth in interconnection agreements. Section 252 does not contemplate or permit the additional charge proposed by US West. Simply stated, US West's ICAM proposal would violate section 252, thwart local competition, and is contrary to the public interest. Therefore, the Commission should grant the

Petition and declare that the imposition of the ICAM would violate the Communications Act.

II. THE ICAM SURCHARGE IS PROHIBITED BY THE PRICING STANDARDS AND THE INTERCONNECTION AGREEMENT PROCESS SET FORTH IN SECTION 252 OF THE ACT

Section 252 provides guidance with respect to the rates that may be collected by ILECs for interconnection, unbundled elements, resale, and transport and termination and also provides a framework for negotiating carriers to agree on those rates or enlist the assistance of the state commission to establish rates in dispute. In this section, Congress set forth the pricing standards that apply for the purpose of providing competitive local exchange service pursuant to section 251. In the same statutory provision, Congress also established the process for requesting carriers and ILECs to enter into interconnection agreements. The rates for interconnection, therefore, are to be embodied in a binding interconnection agreement between the requesting carrier and the ILEC. US West's ICAM petitions disregard both the statutory pricing standards and the binding nature of interconnection agreements reached in accordance with section 252 and must be rejected.

A. Section 252(d) Sets Forth the Pricing Standards for Rates that ILECs May Charge Competing Carriers for Interconnection, Unbundling, or Resale Services

Section 252(d)(1) provides that the prices for interconnection and network elements are to be based on the costs of providing those services.[1] Section

1. 47 U.S.C. § 252(d)(1).

252(d)(2) provides that resale prices must be set at the wholesale rate, which is the retail rate less avoided costs.[2] The Commission has determined that these pricing standards ensure that carriers are properly compensated for the services for which pricing standards are established in section 252(d).[3] However, US West believes that it is entitled to an additional payment for "unplanned network upgrades, the acceleration of planned upgrades in order to comply with state or federal mandates, extensions and/or modifications of network facilities or operational support systems, including data bases and electronic interfaces," which US West characterizes as "network rearrangements."[4] US West's strategy is to turn the statute on its head by attempting to have the state commissions reach a result that would otherwise be prohibited under the Act and impose an ILEC expense on the CLEC outside of the statutory pricing standards.

US West already exercised its designated legal right to recover the types of costs it seeks to recover in its ICAM filing. US West contends that neither the Act nor the FCC's Local Competition Order contains a funding mechanism to reimburse incumbent LECs for the costs of interconnection and access to unbundled network elements. US West is wrong. The Act provides for US West to recover its costs in each of the three categories it includes in the ICAM through arbitrated and

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2. 47 U.S.C. § 252(d)(3). The avoided costs are those not incurred by the local exchange carrier when the service is sold to a carrier and not the end user.

3. Local Competition Order at ¶¶ 733-740.

4. Petition, Exhibit A at 2.

negotiated agreements: resale, access to unbundled network elements, and interconnection for the exchange of traffic between the carriers.

The first category of the proposed ICAM charge relates to the costs of providing wholesale service to resellers. The Act requires US West to offer for resale its retail services at its retail rates minus its avoided costs.[5] In the finalized arbitrations, each of the commissions that arbitrated TCG/US West interconnection agreements established the avoided cost discount for resale.[6] Therefore, these state commissions have already provided US West with the exclusive mechanism permitted by the Act for recovery of those costs. US West is merely attempting to impose additional charges on TCG and other CLECs which have completed the arbitration process.

The second category of the proposed ICAM charge relates to CLECs' access to unbundled network elements. The Act provides that prices for interconnection and unbundled network elements shall be based on cost and may include a reasonable profit.[7] Again, with regard to the arbitrations between TCG and US West, state commissions have applied this principle in establishing interim prices for interconnection and unbundled network elements and determined appropriate

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5. 47 U.S.C. § 252(d)(3).

6. The avoided costs discounts established by the interim rates are subject to the comprehensive review of cost studies by the commissions in open dockets.

7. 47 U.S.C. § 252(d)(1).

interim rates.[8] Moreover, many commissions are continuing to develop permanent interconnection and network element prices consistent with the Act. Therefore, because US West already has availed itself of the method for setting cost recovery for interconnection and network elements, the Commission must reject US West's ICAM request.

The final category of proposed ICAM charges relates to the cost of interconnection for CLECs exchanging traffic between their customers and US West's customers. In reality, these are US West's costs associated with transport and termination of calls which originate on CLEC's network. The terms for transport and termination between US West and TCG have been determined.[9] State commissions have addressed this issue in the arbitrations held thus far and there is no reason to believe that they will not provide US West just and reasonable compensation in future arbitrations. Accordingly, US West's attempt to impose additional charges for transport and termination on TCG through its ICAM proposal must be rejected.

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8. To the extent US West believes the arbitration proceedings and resulting agreements do not enable it to recover the costs to which it is entitled under the Act, US West may appeal those decisions and pursue the remedies available to it under the Act. In fact, US West already has brought actions against TCG under section 252(e)(6) in Arizona, Colorado, and Washington and has filed an action in the United States Court of Claims against this Commission's interim number portability order, regarding compensation.

9. The commissions have ordered bill and keep for varying periods of time, in each case to permit the individual commission to assess whether to retain bill and keep or to adopt alternative means of recovery.

B. The Legal Force of Interconnection Agreements May Not Be Undermined as US West Proposes

US West's state ICAM petitions are particularly unjustifiable in light of the interconnection agreements it has been negotiating with CLECs. Indeed, all of TCG's requests and most, if not all, of AT&T's and MCI's requests for interconnection have resulted in state arbitrations. Therefore, through the arbitration process, and through subsequent state proceedings to establish permanent cost-based interconnection rates, US West can recover its costs that are attributable to interconnection, the provision of unbundled network elements and resale services to competitors, and transport and termination. US West has had the opportunity in these proceedings to seek rates to recover appropriate costs. Now, however, despite entering interconnection agreements in accordance with the statutory procedure outlined by section 252 of the Act, US West is effectively ignoring these agreements by attempting to impose additional exogenous costs on interconnectors. The rates and terms for interconnection must be limited by the four corners of the interconnection agreements themselves. US West's "backdoor" effort to exact additional payments threatens the integrity of the interconnection negotiation process.

The commissions in the states in which TCG has interconnection agreements with US West have identified both the procedural means and cost recovery mechanisms that US West may employ. Those means do not include the filing of a tariff outside of the arbitration process. Rather, the procedural means available to US West are an integral part of the arbitration process and the dispute

resolution procedures provided therein. For example, in Oregon, the Commission has stated: "If USWC believes a particular request for interconnection will impair network facilities or cause it to incur extraordinary costs, it may seek Commission resolution of the matter under the dispute resolution procedures in the contract."[10] Similarly, US West had proposed in the same arbitration that TCG be required to pay in advance for costs related to construction of new unbundled loops that TCG would require. The arbitrator concluded:

> Construction costs are included in the TELRIC price for the particular service. Allowing US West to recover construction costs in the rate and also to impose an additional construction charge would allow the company to recover the same costs twice. Furthermore, including these costs in the price will fairly allocate the cost of constructing new facilities to all the competitors.[11]

Other commissions have adopted similar accommodations to ensure that US West receives appropriate compensation under the Act. For example, in the resolution of the consolidated arbitrations of AT&T, MCI, TCG, ICG and MFS (now Worldcom), the Colorado Public Utilities Commission ("CPUC") used "interim" rates based on interim tariffs for interconnection, unbundling, and resale adopted in June of 1996 pursuant to state law. In finding that it was appropriate to sever the consideration of permanent rates from the initial arbitration hearings, the CPUC considered this Commission's guidance:

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10. Order No. 97-003 at 3.

11. Order No. 96-325 at 11 (emphasis added).

> The FCC did recognize that, in particular arbitration proceedings, a State commission may not have available to it sufficient cost information to establish rates in compliance with the rules (e.g., based upon TELRIC methodologies).[12]

The CPUC went on to state:

> We note that, as in most ratemaking proceedings, the examination of cost studies is critical to price determinations. This is true regardless of what methodologies are used to set prices. Given the importance of the cost to rate decisions, all parties and the Commission should be accorded sufficient opportunity to examine the studies and included cost models.[13]

Despite these accommodations by the state commissions to US West's cost recovery concerns in the course of interconnection arbitrations, US West is pursuing another — and improper — means of exacting payments from TCG and other CLECs. Those carriers, like TCG, that have reached interconnection agreements with US West through the arbitration process can only be left wondering what legal and procedural penalties US West will dream up next to undermine their nascent competitive efforts. The introduction of this additional cost factor not only violates the Act, but must also be characterized as a barrier to entry.

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12. Decision No. C96-1186 at p.11, Docket No. 96A-329T, TCG/US West Arbitration, Adopted November 5, 1996.

13. Id. at 13. The CPUC order also provides that interim rates will be "trued up" with interest to ensure that US West receives full compensation for services provided. The proceeding to determine permanent rates, 96S-331T, is scheduled for hearing beginning April 14, 1997.

III. THE ICAM SURCHARGE WOULD CONSTITUTE AN UNLAWFUL BARRIER TO ENTRY

Section 253 of the Act prohibits any state or local regulation that prohibits or has the effect of prohibiting an entity from having the ability to provide intrastate or interstate service.[14] As correctly stated by Petitioners, states may implement regulations that are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[15] However, such requirements must be imposed on a "competitively neutral basis." Imposition of the ICAM may prevent CLECs from providing service in US West's territory by considerably raising the CLECs' costs of providing service in these areas. If adopted by any state, therefore, the ICAM would violate section 253.

US West proposes that only new entrants bear the costs of the network adjustments it claims to be necessary.[16] Even more significantly, imposing these payments on new entrants will stifle investments in facilities-based competition by absorbing from the competing carriers the capital that would be necessary to implement any such investment plans. Furthermore, US West's proposal is doubly pernicious because US West undoubtedly intends, at least in part, to use the very

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14. 47 U.S.C. § 253(a).

15. Petition at 11 (citing 47 U.S.C. § 253(b)).

16. Despite the fact that US West proposes to collect monthly fees from competitive carriers that may ultimately total between $500 million and $1 billion, US West has provided little or no justification for its planned "network rearrangements" and investments. See Petition at 3.

same "upgraded" and "rearranged" facilities, for which it seeks additional compensation, to provide its own services. Thus, a second and illegitimate goal of US West's proposal is to compel its competitors to subsidize US West's competing service ventures. The Commission should not countenance such a result.

IV. US WEST'S EFFORTS TO IMPEDE COMPETITION ARE CONTRARY TO THE PUBLIC INTEREST

The public interest is not served by permitting US West to circumvent the pricing standards and the process for reaching interconnection agreements set forth in the Communications Act. Until this issue is settled, US West will continue its efforts on a state-by-state basis to collect funds improperly from CLECs.[17] As a result, CLECs continue to fight this issue on every front, using resources that otherwise could be directed toward providing competitive local exchange service. As the Commission well knows, US West's effort in this regard is not an isolated incident.[18]

TCG agrees with Petitioners that US West's state petitions also constitute an abuse of states' processes.[19] In an effort to assess additional charges upon CLECs beyond those authorized by the 1996 Act, it is now forum shopping among the state commissions in an effort to escape the restrictions imposed by federal statute. To the extent that the ICAM state petitions are simply another front for

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17. US West has filed ICAM requests in each of the fourteen states in its territory. Petition at 2.

18. See In the Matter of Petition for Declaratory Ruling Regarding State Authority to Redefine LATA Boundaries, File No. NSD-L-97-6.

19. Petition at 15-16.

US West to air its unconstitutional takings arguments, which have been unsuccessful to date,[20] it now asks state commissions to do what the federal statute clearly says it cannot — thwart the advent of competition in the local exchange service market. In doing so, state commissions have been required to expend considerable resources in evaluating these petitions, on top of those resources they have already been required to commit to arbitration proceedings.

This waste of state commission resources in considering US West's meritless petitions, and CLEC resources in challenging them, only serves to delay further the development of local competition and should be interdicted by the Commission. Attention and efforts are diverted from the real challenge at hand, to foster nascent competitive efforts. Congress already has found that local competition is in the public interest, and this Commission has invested untold resources in seeing that Congress' vision is implemented. US West's endeavors to impede the realization of this mandate for competition are contrary to the public interest and must be rejected.

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20. Local Competition Order at ¶¶ 733-735.

V. CONCLUSION

The Commission should grant the Petition for Declaratory Ruling and find that US West's Interconnection Cost Adjustment Mechanism proposal violates the Communications Act.

Respectfully submitted,

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Dated: April 3, 1997

CERTIFICATE OF SERVICE

I, Dottie E. Holman, do hereby certify that a copy of the foregoing Comments was sent by first-class United States mail, postage prepaid, and hand-delivery, as indicated, this 3rd day of April, 1997, to the following:

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